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In the Supreme Court of the United States

OCTOBER TERM, 1978

IN RE CARL MAX JANAVITZ and
BURTON SANDLER, PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The per curiam opinion of the equally divided en banc court of appeals (Pet. App. 17a-19a) is reported at 576 F. 2d 1071. The opinion of the district court (Pet. App. 1a-14a) is reported at 436 F. Supp. 818.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1978. The petition for a writ of certiorari was filed on June 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in disqualifying petitioners, who are attorneys, from representing an immunized grand jury witness, when they also represented the target of and other witnesses in the grand jury investigation.

STATEMENT

Following a hearing in the United States District Court for the Western District of Pennsylvania, the district court granted the government's motion to disqualify petitioners from representing Phyllis Johns, a grand jury witness, but denied the government's motion to disqualify petitioners from representing several other witnesses subpoenaed before the grand jury (Pet. App. 1a-14a).[1] Both petitioners and the government appealed, and the court of appeals ordered the cases to be heard en banc (*id.* at 15a-16a). It then dismissed the government's appeal for want of an appealable order and affirmed the disqualification order by an equally divided court (*id.* at 17a-19a).

The evidence adduced at the hearing on the motion to disqualify showed that on February 16, 1977, FBI agents, acting pursuant to an investigation into possible violations of 18 U.S.C. 371, 1462 and 1465 (relating to the interstate distribution of obscene materials), executed a search warrant on the premises of the Majestic News Company in Pittsburgh, Pennsylvania, and seized a large quantity of allegedly pornographic films and other records of the company (Tr. 8). Thereafter, the grand jury subpoenaed Gregory Kocan, the manager of Majestic News and the main target of the grand jury's inquiry, Phyllis Johns, the company's secretary and bookkeeper, five other present or former employees of the company, and four of its business associates (Tr. 20-21, 51, 92). Kocan instructed Johns to recommend to the other witnesses that they retain petitioners as their attorneys

[1]The government sought to disqualify petitioners from representing 11 grand jury witnesses. Petitioners' voluntary withdrawal from representation of four of the witnesses rendered the motion moot as to those witnesses.

and to advise them that Majestic News would provide loans for attorney's fees (Tr. 175, 181, 253, 268). Johns so advised the witnesses who, along with herself and Kocan, then retained petitioners (Tr. 182-185, 196-198).[2]

Prior to the witnesses' appearance before the grand jury in April 1977, the Assistant United States Attorney conducting the investigation informed petitioner Sandler that some of his clients were not in the same legal position as others and that it would be in the best interest of those persons to consider cooperating with the government (Tr. 55). The government attorney also advised petitioners that he believed there was a conflict of interest caused by petitioners' representation of the 11 witnesses (Tr. 58-59, 84-85). Petitioners did not seek immunity for any of the witnesses in exchange for their cooperation (Tr. 340-341) and instead informed the government that all of the witnesses then scheduled to appear before the grand jury would, on advice of counsel, invoke their privilege against self-incrimination (Tr. 55). Also prior to the grand jury appearances, petitioner Sandler informed the witnesses at a group meeting arranged by Kocan that he did not perceive a conflict in his continued joint representation of them but that he would withdraw if a conflict did in fact develop (Tr. 202-203, 215-216, 347-348). Petitioner Sandler did not notify any of the witnesses of the statement by the Assistant United States Attorney that it might be in their best interests to cooperate with the government in return for immunity (Tr. 204-207).

[2]The witnesses testified that, although they paid petitioners' fees from their own funds and no specific promises of repayment had been made, they hoped that Majestic News would reimburse them for their legal expenses (Tr. 137, 174, 180-181, 218, 234, 253, 282, 297, 299-300, 307, 321, 329, 332). Ten of the witnesses were jointly represented by petitioners; witness Ben Nabors was represented by petitioner Janavitz alone (Tr. 79-80, 293).

Thereafter all the witnesses except Johns (who was granted immunity) asserted their Fifth Amendment privilege and refused to answer questions before the grand jury (Tr. 79). Johns testified briefly before the grand jury, but did so in a vague and evasive manner. She left the grand jury room after virtually every question to consult with petitioner Janavitz and, as Kocan stood within a few feet of them, to tape record each question and answer (Tr. 9, 62, 115-116, 194).

Following these grand jury appearances, the government moved to disqualify petitioners from representing all 11 witnesses. The Assistant United States Attorney did not discuss with petitioners the possibility of immunity for any witnesses other than Johns before filing the disqualification motion, because of the problems posed by petitioners' multiple representation and because of Johns' lack of cooperation even after having been given immunity (Tr. 87, 341-342). At the conclusion of the disqualification hearing, however, the government made formal offers of non-prosecution to Johns and four other witnesses (Tr. 360-364). Subsequently, but prior to the district court's ruling, petitioners withdrew from representing the four witnesses but persisted in their representation of Johns, Kocan and the other five witnesses (A. 29).[3] The court then disqualified petitioners from representing Johns (A. 11).

ARGUMENT

Petitioners argue that the district court's order disqualifying them from representing Phyllis Johns violated her right "to freedom of association and counsel

[3]"A". refers to the appendix filled in the court of appeals.

of [her] choice" (Pet. 11)[4] and that this Court should resolve an alleged conflict among the circuits on the propriety of joint representation of witnesses appearing before a federal grand jury (*id.* at 7-10).

We recognize that the issue of joint representation at the grand jury stage is a significant one, implicating important and, in some circumstances, competing considerations of legal ethics, the need for unimpeded grand jury proceedings, the right to counsel of one's choice, and the judiciary's supervisory power over an arm of the district court. We also agree that the courts of

[4]Although petitioners may have standing to contend that the disqualification order arbitrarily interfered with their right to engage in the practice of law (see, *e.g.*, *In re Ruffalo*, 390 U.S. 544 (1968); *Dent* v. *West Virginia*, 129 U.S. 114 (1889)), there is a substantial question whether petitioners have standing to assert that the order abridged their former client's alleged First and Sixth Amendment rights. But see *In re Investigation Before April 1975 Grand Jury*, 531 F. 2d 600, 606 n.10 (D.C. Cir. 1976). As a general rule litigants lack standing to assert the constitutional rights of other persons. See, *e.g.*, *United States* v. *Raines*, 362 U.S. 17, 21 (1960); *Tileston* v. *Ullman*, 318 U.S. 44, 46 (1943). Although the Court has recognized several exceptions to this general proposition, this is not a case where requiring the third parties to assert their own rights would nullify the very rights asserted (compare *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958)), nor is it a situation where the claimant's rights are so intertwined with the third parties' that assertion of the third parties' rights is necessary not only to prevent their dilution but also to allow the claimant adequately to protect his own rights (compare *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965), with *Eisenstadt* v. *Baird*, 405 U.S. 438, 443-446 (1972)), nor must the criteria for standing be relaxed in this case to prevent an intolerable inhibition on the exercise of free speech (see *Thornhill* v. *Alabama*, 310 U.S. 88, 92-99 (1940); cf. *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972)). Clearly, Johns could easily protect her own rights by appealing from the disqualification order, a procedure that has been followed in other cases. See *In re Taylor*, 567 F. 2d 1183 (2d Cir. 1977). Cf. *Fisher* v. *United States*, 425 U.S. 391, 396-401 (1976).

appeals in recent years have announced somewhat divergent views on the authority of district judges to disqualify counsel in grand jury proceedings because of a conflict of interest and that it may be necessary at some point for this Court to consider the matter in an appropriate case. This, however, is not such a case. The record clearly supported the district court's determination that petitioners could not be allowed to represent both Johns, who had been given use immunity and a promise of non-prosecution in return for her cooperation in the government's investigation, and Kocan, the main focus of the grand jury's inquiry. Moreover, no circuit has held that a judge with responsibility for supervising the conduct of a federal grand jury is powerless to order disqualification in this situation.

1. This Court has remarked time and again on the importance of the grand jury's investigative function and of the obligation of all citizens to give evidence before that body. *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *United States* v. *Dionisio*, 410 U.S. 1, 16-18 (1973); *Branzburg* v. *Hayes*, 408 U.S. 665, 682, 688 (1972). It cannot be doubted that the public interest in full and effective grand jury proceedings is severely frustrated when a witness, such as Phyllis Johns, refuses to testify candidly even after receiving immunity. This interest cannot be satisfactorily vindicated simply by the remedy of contempt, for whatever the punishment imposed, the grand jury would still be deprived of the needed evidence and the judicial process would still be obstructed. In such circumstances, it is incumbent upon the trial judge to determine the cause of the obstruction and to employ reasonable methods, consistent with the rights of all involved, to remove the roadblock. When the court undertakes that inquiry and concludes that the impediment is the joint representation of the

uncooperative witness and of other persons who may be implicated by that witness's testimony, it must have discretion to resolve the problem by disqualifying counsel from representing clients whose interests appear to be adverse.

Moreover, a district court's power to order an end to multiple representation of grand jury witnesses is not grounded solely in its responsibility to eliminate improper obstacles to the grand jury's work. Also involved is the court's obligation to control the conduct of its officers, here defense attorneys, in instances strongly suggesting a breach of or insensitivity to ethical obligations. See *Hull* v. *Celanese Corp.*, 513 F. 2d 568, 571 (2d Cir. 1975). Canon 5 of the American Bar Association's Code of Professional Responsibility cautions that "[a] lawyer should never represent in litigation multiple clients with differing interests" and that "there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests" (EC 5-15). When such a conflict appears from the record, the court must take appropriate action to remove it.

These difficulties cannot be solved simply by obtaining a waiver from the clients involved. While a defendant in a criminal case may, under some circumstances, waive his right to conflict-free counsel at trial (see, *e.g.*, *United States* v. *Gaines*, 529 F. 2d 1038, 1044 (7th Cir. 1976); *United States* v. *Armedo-Sarmiento*, 524 F. 2d 591, 593 (2d Cir. 1975); *United States* v. *Garcia*, 517 F. 2d 272, 275-278 (5th Cir. 1975)), the considerations are far different at the pre-indictment stage. For one thing, there is the strong public interest, mentioned above, in removing impediments to untrammeled grand jury investigations, including impediments caused by the joint representation of witnesses with adverse interests, that has

no parallel during a trial. A client obviously cannot waive the public's right to fair and complete criminal investigations.

Furthermore, "a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judiciary proceedings have been initiated against him." *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972). Hence, unlike a criminal defendant, a witness before the grand jury has no constitutional right to counsel, much less to the counsel of his choice (see *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976); *In re Groban*, 352 U.S. 330, 333 (1957); *United States* v. *Scully*, 225 F. 2d 113, 116 (2d Cir.), cert. denied, 350 U.S. 897 (1955)), and accordingly the court need not show the same deference to the client's wishes during grand jury proceedings that it would at trial, especially when other values would thereby be seriously jeopardized. In addition, the court can obtain no satisfactory assurance that the witness has indeed knowingly and intelligently waived objection to the conflict when the witness has made the decision based on the advice of the attorney with conflicting interests and without the assistance of independent counsel.

2. These considerations strongly indicate that a district court has discretion to disqualify counsel from representing multiple witnesses in a grand jury proceeding when the court reasonably believes that the joint representation involves a conflict of interest obstructing the work of the grand jury or raising ethical concerns. Applying this standard, the court did not abuse its discretion in disqualifying petitioners from representing Johns in the circumstances of this case. To begin with, the joint representation obviously was impeding the grand jury's inquiry. Despite the grant of immunity, Johns' testimony was abbreviated and evasive and was

interrupted by her leaving the grand jury room after virtually every question to tape record the questions and answers—with Kocan within earshot. Johns, as the bookkeeper and secretary of Majestic News, plainly was in a position to give critical testimony regarding her employer and fellow employees, yet the grand jury was unlikely to obtain her full cooperation so long as she was represented by attorneys who had been picked (and perhaps eventually compensated) by her employer and who also represented the prime target and other subjects of the investigation.

By the same token, there was "a direct and immediate conflict of interest in [petitioners'] representation of" both Johns and Kocan (Pet. App. 6a). As the district court noted, "[t]he conflict is certainly direct in that [petitioners] represent a person who is operating under a grant of statutory use immunity as well as people who are prospective defendants. The conflict is also immediate because Mrs. Johns has a formal offer of non-prosecution by the government. It requires but a statement of the obvious to realize that negotiations for a promise of non-prosecution cannot be conducted by attorneys who also represent those people who may well be hurt by testimony resulting from such a promise.[5] There can be no better example of the ancient axiom that '*no man can serve two masters*' " (Pet. App. 5a-6a; emphasis in original). Petitioners obviously could not give undivided loyalty to either client, since Johns' interest in testifying fully and truthfully, and thus avoiding any personal liability, may well have led her to implicate Kocan and could not be reconciled with Kocan's interest in nondisclosure.

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[5]Government counsel testified that the joint representation inhibited discussion with petitioners concerning Johns' role in the investigation (Tr. 87, 341-342). See *In re Investigation Before February, 1977, Lynchburg Grand Jury*, 563 F. 2d 652, 656 (4th Cir. 1977).

Petitioners also could not avoid being influenced in representing one client by confidential matters they learned by representing the other.[6] As this Court recently emphasized in a related contest, "in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." *Holloway* v. *Arkansas*, No. 76-5856 (Apr. 3, 1978), slip op. 15 (emphasis in original).

Finally, although Johns attempted to waive any conflict of interest, the court properly concluded that the waiver was ineffective. Not only can such waivers not be dispositive in the grand jury context, for the reasons mentioned above, but also the record in this case casts serious doubt on whether Johns' waiver was knowing and intelligent. Her waiver, the court found, was "likely *a function in large part of one's natural hesitancy to alienate their employer rather than a product of a free and unrestrained will*" (Pet. App. 7a; emphasis in original). Indeed, Johns' decision not to obtain different counsel undoubtedly was attributable in no small measure to petitioners' advice to her that no conflict of interest existed (Pet. App. 7a-8a). See *United States* v. *Garafola*, 428 F. Supp. 620, 624 (D. N.J. 1977).

In sum, as the Fifth Circuit has remarked in upholding the disqualification of an attorney from representing multiple witnesses in a grand jury investigation, "the public interest in a properly functioning judicial system must be allowed to prevail in the case presently before us. Appellant had placed

[6]Indeed, petitioner Janavitz testified that he discussed aspects of Johns' testimony before the grand jury with Kocan (Tr. 116-117).

himself in a clear conflict situation from which the district court had the duty to rescue both the lawyer and his clients." *In re Gopman*, 531 F. 2d 262, 268 (1976).

3. Contrary to petitioners' contention (Pet. 7-10), the decision below does not conflict with the holding of any other court of appeals. Six circuits have addressed the question whether a district court may disqualify an attorney from representing witnesses with adverse interests in a grand jury proceeding, and none has concluded that the court is powerless to order disqualification in those circumstances. See *In re Special February 1977 Grand Jury*, No. 78-1520 (7th Cir. Aug. 11, 1978); *In re Taylor*, 567 F. 2d 1183 (2d Cir. 1977); *In re Investigation Before February, 1977, Lynchburg Grand Jury*, 563 F. 2d 652 (4th Cir. 1977); *In re Grand Jury Empaneled January 21, 1975*, 536 F. 2d 1009 (3d Cir. 1976); *In re Investigation Before April 1975 Grand Jury*, 531 F. 2d 600 (D.C. Cir. 1976); *In re Gopman, supra.*

In two of these cases, the court of appeals upheld the district court's disqualification order. *In re Investigation Before February, 1977, Lynchburg Grand Jury, supra*; *In re Gopman, supra.* In the remaining cases, the court declined to require that an attorney representing multiple grand jury witnesses be disqualified, but only because the government's motion was premature (*In re Taylor, supra*, 567 F. 2d at 1187; *In re Grand Jury Empaneled January 21, 1975, supra*, 536 F. 2d at 1011, 1012-1013; *In re Investigation Before April 1975 Grand Jury, supra*, 531 F. 2d at 609) or because the record did not contain an adequate showing that the witnesses were truly adverse (*In re Special February 1977 Grand Jury, supra*, slip op. 5).[7] Indeed, it is significant that in each of the cases

[7]Although there is language in *In re Taylor, supra*, 567 F. 2d at 1191-1192, suggesting that the Second Circuit does not consider

holding that the disqualification attempt was premature, the court stressed the absence of any offer of immunity to the uncooperative witness.[8] Here, of course, Johns was given not only use immunity, but also a promise of non-prosecution, yet she persisted in her refusal to cooperate with the grand jury's inquiry for reasons that the district court found were the direct result of the joint representation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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disqualification to be an appropriate remedy in cases of a conflict of interest, these comments were not necessary to the court's decision and were not joined by other members of the panel. See *id.* at 1193 (Kaufman, C. J., concurring).

[8]See *In re Investigation Before April 1975 Grand Jury, supra,* 531 F. 2d at 605-609; *In re Grand Jury Empaneled January 21, 1975, supra,* 536 F. 2d at 1011; *In re Taylor, supra,* 567 F. 2d at 1187. See also *In re Special February 1977 Grand Jury, supra,* slip op. 5; *In re Grand Jury,* 446 F. Supp. 1132, 1136 (N.D. Tex. 1978).